

ATTACHMENT E



UNITED STATES MARINE CORPS
DEFENSE SERVICES ORGANIZATION
MARINE CORPS RECRUIT DEPOT
3700 CHOSIN AVENUE
SAN DIEGO, CALIFORNIA 92140-5197

IN REPLY REFER TO:
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9D
30 Mar 2012

From: Capt N.R. Grey, Counsel for Respondent
To: Naval Civil Law Support Activity, Code 132
Via: Civil Law Officer, MCRD San Diego

Subj: ETHICS ADVISEMENT REQUEST ICO POLITICAL ACTIVITIES OF SGT GARY STEIN,
USMC, 0101/6842

1. I have been assigned as defense counsel to represent eight-year veteran Marine Sgt. Gary A. Stein before an Administrative Separation Board which has been scheduled to convene on 5 April 2012 to hear charges against Sgt. Stein for alleged inappropriate use of a social media website in violation of Department of Defense ("DoD") Directive Number 1344.10. Based on my examination of that Directive and other guidance, I believe that Sgt. Stein is unable to have fair notice of the charges against him, is unable to defend against those charges, and is unable to receive a fair hearing because the charge is based on an ambiguous and conflicting set of policies which have never been clarified by implementing regulations, as required by DoD Directive 1344.10.5.2. The ambiguity and confusion in the DoD Directive, which implicates First Amendment rights to speech, press, religion, assembly and petition, could be resolved by the issuance of a Legal Ethics Opinion by your office to ensure that the DoD directive is being interpreted consistent with an injunction against DoD and the United States Navy by the United States District Court for the District of Columbia that was never appealed. See *Rigdon v. Perry*, 962 F. Supp. 150 (D.D.C. 1997). Therefore, on behalf of Sgt. Gary Stein, I submit this request for a Legal Ethics Opinion on the following three issues:

Questions Presented

2. **Question One:** Have the Defense Department's Directive Number 1344.10 and other interpretative documents been modified to fully comply with the Order of United States District Court Judge Stanley Sporkin against the Department of Defense, et al., in *Rigdon v. Perry*, 962 F. Supp. 150, 166 (D.D.C. 1997), "that the defendants' interpretation of DoD Directive 1344.10 and similar regulations as barring the plaintiff chaplains from urging their military congregants to communicate with Congress on passage of the Partial Birth Abortion Ban Act violates the plaintiffs' rights under the First Amendment" and that "the defendants, the defendants' officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with the defendants who receive actual notice of this order are hereby ENJOINED from interpreting DoD Directive 1344.10, or any similar law or regulation, in a manner that prohibits the plaintiffs from exercising their free speech ... rights under the First Amendment of the Constitution..."

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3. **Question Two:** May an active duty, non-commissioned U.S. Marine maintaining a Facebook web page bearing a clear disclaimer that all statements are personal views, not made in an official capacity and not representing the views of the Marine Corps, make statements thereon supporting or opposing either (i) a political party or (ii) a candidate for federal, state or local office or (iii) both?

4. **Question Three:** May such a Marine make statements critical of a candidate for political office when that candidate is also currently serving in office? Does a separate rule apply to criticisms of a candidate for political office serving as President of the United States?

Ambiguities and Confusion in DOD Directive 1344.10.4

5. The restrictions against (a) speaking before a partisan political gathering, including any gathering that promotes a cause; and (b) participating in any "discussion" as an advocate for or against a cause appear to be content- and viewpoint-discriminatory. See *Rigdon v. Perry*, 962 F. Supp. 150, 164 (D.D.C. 1997). This is because, while the promotion or discussion as an advocate of the incumbent president is *permitted*, a member is *prohibited* from engaging in such speech with regard to opposing the incumbent as well as supporting the non-incumbent candidate for president. Likewise, the restrictions prohibit advocacy of causes deemed to be *contrary* to existing policy, while permitting members to promote or discuss views in *support* of existing policy. Thus, speech in support of the incumbent president, existing legislation, or public policy would comply with these restrictions. On the other hand, speech *not* in support of the incumbent president, existing legislation, or public policy would violate these restrictions. Can these restrictions be used to subject a member to punitive action under the UCMJ or be used to involuntarily separate a member from the armed forces?

6. According to DoD Directive 1344.10.4, it is DoD policy "to encourage members of the Armed Forces ... to carry out the **obligations of citizenship**." The obligations of citizenship include the exercise of the voting franchise and the selection of elected officials to represent the people in our Constitutional Republic. To that end, according to sections 4.1.1.1 and 4.1.1.6 of the directive, a service member may express his "personal opinion on **political candidates** and issues," including writing a "letter to the editor of a newspaper expressing the member's personal views on public issues or **political candidates**." However, he is also told that he may not engage in any activity that could be construed as **partisan advocacy or endorsement** on behalf of any specific **political candidate or issue**. See sections 4.1.1.6 and 4.1.2.3. (Emphasis added.) The distinction between expressing an opinion publicly on political candidates, which is permitted, as opposed to partisan advocacy and endorsements, which is prohibited, is not explained in such a way as to ensure that the service members would know what they can and cannot say. Without providing a careful distinction between expressing one's opinion and partisan advocacy or endorsement, it appears that the rights of a service member under this policy depend upon the zeal, or lack thereof, in the expression of one's opinion, or the subjective opinion of whoever might be deciding the question.

7. The DoD Directive encourages a service member "to carry out the obligations of citizenship," but could be read to imply that he must act

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alone, not in cooperation or concert with others. See, e.g., sections 4.1.1.1, 4.1.1.6, 4.1.1.8, 4.1.2.1, and 4.1.2.3. Indeed, section 4.1.2.3 prohibits a service member from even "allow[ing]" others to use any expression of a service member's political opinion to "solicit votes." Additionally, although section 4.1.1.2 permits a service member to "promote and encourage others to exercise their voting franchise," could such action be construed as an impermissible effort to solicit a vote on behalf of the candidate that he supports and, thus, be in violation of section 4.1.1.3?

8. The DoD Directive is unclear as to its application to a public figure wearing two hats as a candidate for election and as an incumbent office holder. While section 4.1.1.1 states that a service member may express "a personal opinion on political candidates and issues," how would this provision be construed if an opinion expressed relates to actions taken by a candidate for President who happens also to be an incumbent office holder? Would there be a different rule that applies to an incumbent office holder who happens to be President of the United States?

9. DoD Directive 1344.10 at 4.1.2.3 prohibits the publication of "partisan political articles, letters, or endorsements signed or written by the member that solicits votes for or against a []cause." Section 4.1.2.5 states that a member of the Armed Forces shall not "Speak before a partisan political gathering, including any gathering that promotes a []cause." Finally, 4.1.2.6 prohibits "Participat[ion] in any radio, television, or other program or group discussion as an advocate for or against a []cause." The term "cause" is used in several other places in DoD Directive 1344.10; however, the term is nowhere defined. The term "cause" would seem to be capable of encompassing all public policy issues, thereby undermining the very duty of citizenship which is the stated policy objective of the Directive. Examples include questions of religion, "Don't Ask - Don't Tell", pro-choice vs. pro-life, gun rights, or virtually any policy issue being widely discussed in the nation. In light of the important constitutional guarantees of the freedoms of speech, press, assembly and petition, it appears that a clearly stated, working definition of this term would best forward the aims of the directive rather than the punitive enforcement or administrative discharge proceedings under Article 134, UCMJ, resulting in involuntary separation.

10. DoD Directive 1344.10, while specifically designed to "encourage members of the Armed Forces ... to carry out the obligations of citizenship," fails to provide for a safe harbor wherein such citizenship would be encouraged. Instead, it appears that the only procedures are punitive in the nature of either a threatened court martial or an involuntary separation. In light of the important constitutional guarantees of the freedoms of speech, press, assembly and petition, it appears that procedures that would facilitate correction, modification and mediation would best forward the aims of the directive rather than the punitive enforcement or administrative discharge proceedings under Article 134, UCMJ, resulting in involuntary separation.

11. DoD Directive 1344.10 at 4.1.1.6 permits a Member to "Write a letter to the editor of a newspaper expressing the member's personal views on public issues." May a soldier state the truism that he would not obey an unconstitutional or illegal order?

12. Section 4.1.3 states that "commissioned officers shall not use contemptuous words," as prohibited by law. This is consistent with Article

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88, UCMJ. Under the rule of construction *expressio unius est exclusio alterius*, this Guidance document exempts non-commissioned officers and enlisted men from this restriction. Can this section be used as the basis for the punitive action against an enlisted man?

Lack of Clarifying Implementing Guidance

13. Regulations and procedures are regularly produced by the secretaries of the various military forces to implement and clarify such directives, but we have identified only one that appears to be relevant – a Department of the Navy Guidance for Unofficial Internet Posts and "Social Media Guidance" released on June 2010 (hereinafter "DON Internet Guidance"). However, even that Guidance reflects the complexity and ambiguity of DoD Directive 1344.10.5.2 in that it gives persons like Sgt. Stein conflicting signals, simultaneously advising "You can express your **political** opinion within DoD guidelines," but then warning "Don't Get **Political**." (Emphasis added.) The DON Unofficial Internet Posts and Social Media Guidance fails to provide the necessary clarification for what is and what is not permitted. Instead, it restates in simple language what is set forth in DOD Directive 1344.10, bringing no clarification to the ambiguities in that document.

Conclusion

14. The members of the board who have been appointed by the convening authority to hear the case of Sgt. Stein are not lawyers, or otherwise legally trained, but they nevertheless will be required to interpret and to apply the complex and conflicting policy standards which limit First Amendment rights to free speech, press, religion, assembly and petition discussed above. Issuance of a Legal Advisory Opinion would provide those members with necessary guidance to fulfill their role relating to the Administrative Discharge hearing. Clear legal guidance is also needed by Sgt. Stein well before the hearing so he can know the rules which govern his behavior, have understanding of the charges against him, and be able to make a proper defense of his actions. Further, there is a need for clear guidance for Members of the Armed Forces as to what they may or may not do, and what communications and personal expressions are permitted with respect to the new area of social media. Such guidance should, of course, be consistent with established First Amendment law.



N. R. GREY